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No. _____

In The

Supreme Court of the United States

October Term, 1993

SELLICK EQUIPMENT, INC.,

Petitioner,

versus

JOSEPH BOUTTE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SELLICK EQUIPMENT LIMITED-APPLICATION

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QUESTIONS PRESENTED FOR REVIEW

I.

Does a United States District Court have the authority to remand a properly-removed suit, over which it retains subject matter jurisdiction, when the only cause given for the remand is the joint consent of the parties?

II.

May a United States District Judge remand a suit over which he has subject matter jurisdiction without any reference to 28 U.S.C. 1447(c), but solely based upon the "consent" of the parties?

III.

May the parties to a properly-removed suit over which a United States District Court has subject matter jurisdiction deprive that Court of its jurisdiction by consenting to a remand without citing any grounds therefor under 28 U.S.C. 1447(c)?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

(1) James B. Doyle – Woodley, Williams, Fenet, Boudreau, Norman & Brown, 500 Kirby Street, P.O. Drawer EE, Lake Charles, Louisiana 70602, (318) 433-6328, Attorneys for Sellick Equipment Limited, Defendant/Petitioner.

(2) Richard Ducote, 335 Decatur Street, New Orleans, Louisiana 70130, (504) 581-5152, Attorney for Joseph M. Boutte, Respondent/Appellant.

(3) Darrell Cherry – Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana 70130, (504) 581-5141, Attorneys for Morton International, Inc. and James Derise, Defendant.

(4) Honorable Richard T. Haik, United States Western District Judge, Lafayette – Opelousas Division, 213 Federal Building, 705 Jefferson Street, Lafayette, Louisiana, 70501, (318) 262-6875.

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REPORTS OF OPINIONS BY PRIOR COURTS

The Honorable Richard T. Haik, Jr., United States District Judge for the Western District of Louisiana, Lafayette – Opelousas Division, issued written reasons on October 18, 1993, which denied the Motion to Vacate Remand Order filed by Sellick Equipment, Limited. The United States Court of Appeals for the Fifth Circuit denied, without written reasons, Petitioner's Petition for Writ of Mandamus and/or Prohibition on November 16, 1993.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254. Subject matter jurisdiction in the proceeding below was alleged pursuant to 28 U.S.C. 1332.

This petition seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered on November 16, 1993, denying Petitioner's Writ of Mandamus.

STATUTES AT ISSUE IN THIS CASE

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens of subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts

is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business, and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the districts courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. In interest such action shall be removable only if none of the parties. Any other properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1608(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without

jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation.

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings

* * *

(h) Waiver or Preservation of Certain Defenses.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

§ 1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

A. (1)(a) The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.

(b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

(2) For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

B. Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

C. The immunity from civil liability provided by this Section shall not extend to:

(1) Any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and

(2) To the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

STATEMENT OF THE CASE

Joseph Milton Boutte filed suit against Morton International, Inc., James Derise and Sellick Equipment, Limited in Iberia Parish, Louisiana, on July 8, 1991. Petitioner Sellick Equipment Limited is a Canadian Corporation. Morton International, Inc. is a corporate citizen of Indiana, whose principal place of business is Illinois. James Derise is a resident of Louisiana, as is Boutte.

Morton and Derise removed on July 26, 1991, asserting federal subject matter jurisdiction existed pursuant to 28 U.S.C. 1332. Morton also asserted the fraudulent joinder of Derise, and further pled that the inclusion of Morton as a defendant did not destroy diversity under the cited statute. In its removal petition, Morton represented, contrary to the allegations of the removed suit, that it was organized under the laws of the State of Indiana, not Louisiana. It also asserted Derise was "fraudulently joined without a legal basis solely in an attempt to destroy diversity." Notice of Removal, paragraph 3, App. p. 7. Neither of those points was ever litigated in the District Court.

On August 5, 1991, Morton answered the complaint in Federal Court. On August 6, 1991, Sellick was served under Louisiana procedure by delivery of a certified copy of the petition to the Secretary of State.

No further action was taken in Federal Court. The thirty day remand period for procedural defects specified in 28 U.S.C. 1447(c) passed without event.

On March 12, 1992, respondent Boutte's complaint against Sellick was dismissed by the Clerk of Court, since

Sellick, a named defendant, had filed no appearance (*cf.* ULLR 11.02(W), Louisiana local rules for the United States District Courts).

On April 13, 1992, respondent filed a Motion to Reinstate his lawsuit against Sellick, annexing to the Motion a copy of the Answer Sellick had filed in the state court pleadings on or about September 25, 1991, well after removal. On the same day, the Court reinstated Boutte's action against Sellick, and specifically required issue as to Sellick be joined "within thirty days, by answer filed or request for default judgment . . . " (App., p. 26). Sellick never entered an appearance in the District Court suit.

On April 27, 1992, nine months after removal, respondent Boutte moved *ex parte* to dismiss Morton and Derise, the original removing defendants. In that document, he specifically reserved any claim against Sellick, described additionally in that pleading as "the remaining defendant . . . " (App., p. 27). Although the Motion to Dismiss represents Sellick had been contacted and voiced no opposition to the granting of the Motion for Non-Suit, no counsel had entered appearance on behalf of Sellick, and Sellick did not join the Motion.

On May 5, 1992, eleven months after removal, respondent Boutte filed a Motion to Remand without citing statutory or other grounds; and in that document represented that counsel for Sellick was "concurrently filing his consent to the remand." But that document is conspicuously absent from the record, no pleading to that effect has ever been filed, and as far as the Federal Court was concerned, no counsel existed for Sellick. In response to the Motion, again without citing any statutory grounds

for his action, the District Judge signed the order and remanded the case to the state court from whence it came.

On August 27, 1993, petitioner Sellick filed a Motion to Vacate the previous remand order. After a telephone conference, the District Judge issued written reasons which found, *inter alia*, "that at the time of the May 19, 1992, remand of this case, the defendant desired to remand the case to the 16th Judicial District of Iberia Parish. In addition to the consent of the parties at the time of the remand, the lengthy delay in applying to vacate the order gives further support for this denial." (App., p. 42).

After the entry of Judge Haik's Order denying the Motion to Vacate, petitioner filed for relief from the United States Court of Appeals for the Fifth Circuit. In its Petition for Writ of Mandamus, Sellick urged that a remand issued without resort to the statutory authority granted United States District Judges under 28 U.S.C. 1447(c) is *ultra vires* and without effect; that the consent of the parties to a voluntary remand, even if such was proved, does not operate to give the Judge any additional authority Congress did not give him; and, as the Order previously entered remanding the case was *ultra vires*, it must be considered absolutely null, and subject to a Motion to Vacate at any time.

The Court of Appeals denied the relief sought by Petitioner, who now seeks the same relief from this Court.

ARGUMENT

In *Thermtron Products, Inc. v. Hermansdorfer,* 96 S. Ct. 584, 423 U.S. 336, 46 L.Ed. 2d 542 (1976), this Court held that a District Judge remanding a properly-removed action on any ground other than that the case was removed "improvidently and without jurisdiction" exceeds his authority under 28 U.S.C. 1447(c). The action of the District Judge in the case at bar, and the Court of Appeals in denying Mandamus, amounts to such a clear violation of the mandate of this Court that it cannot be overlooked.

Limited as it is by Congress, federal jurisdiction over the subject matter of litigation is fact-based and zealously guarded. *Cabe v. Pennwalt Corp.,* 372 F.Supp. 780 (USDC W.D.N.C., 1974). So it has long been clear that parties cannot combine to confer jurisdiction upon the Courts of the United States by collusion or by consent. See, *e.g., A.L. Rowan & Son v. Department of Housing & Urban Development,* 611 F.2d 997 (5th Cir. 1988); *City of New York v. Exxon Corp.,* 697 F.Supp. 677 (S.D. N.Y. 1988); *Mayer Paving & Asphalt Co. v. General Dynamics Corp.,* 486 F.2d 763 (1973); Rule 12(h)(3) FRCP.

The question here posed is the converse: Assuming, for purposes of this argument only, petitioner Sellick acquiesced in the Motion to Remand: Can such consent *destroy* jurisdiction when collusion could not have *created* it?

Although not a party to the removal, Sellick was clearly before the Court at the time the remand order issued. On the face of the removed petition, Sellick's

position in the suit did nothing to destroy diversity jurisdiction. If it was a "defect in removal procedure" under Section 1447 for Sellick not to have joined in the removal, that defect was waived by the expiration of thirty days from the Notice of Removal.

No deficiency in the Notice of Removal is noted in the record, nor alleged in any document. But even if Sellick had wanted to be in state court, and had objected to the removal, no statutory basis exists for such objection to be lodged after the expiration of thirty days. And in any case, it was Boutte, not Sellick, who sought remand.

As far as federal law is concerned, at the time the Motion to Remand was filed, this case was properly before the federal district court on subject matter jurisdiction granted by Congress. Boutte could have accomplished the same result by a Motion to Dismiss as of nonsuit, which could have been filed at the stage, since Sellick had not filed an appearance. FRCP 41(a)(1)(i). Save that remedy, which might have produced special problems for Boutte concerning the running of time under Louisiana's one-year statute of limitations, no certain method existed to destroy the federal jurisdiction created, not by the parties, but by Boutte's action and the facts which necessarily attached to his pleadings.

A District Judge may no more remand a properly-removed suit because the parties consent than he may because his docket is too crowded. *Thermtron, supra.* A District Judge may no more remand a case by consent to the parties than she may do so *sua sponte* upon noticing what she determines to be a defect in the removal. *In Re*

Allstate, 8 F.3d 219 (5th Cir. 1993). While federal jurisdiction is narrowly defined, so too is the authority of the district judge to remand. No authority for remand was cited in the Motion, nor in the Order signed by Judge Haik, because none existed.

For these reasons, Judge Haik's remand order must be deemed without effect. Thus, the Motion to Vacate should have been granted.

A. Mandamus is the proper remedy and should have been allowed by the Court of Appeal

Although removal orders are not subject to review, see generally 28 U.S.C. 1447(c), this Court in *Thermtron, supra*, designated Mandamus as the proper procedural remedy when a remand is entered on grounds not enumerated in that statute. This result was followed recently by the Fifth Circuit in *In Re Allstate, supra*. Thus, Petitioner's filing of a Motion to Vacate, followed by a Petition for Mandamus regarding denial of that Motion, is the proper remedy. *In Re Shell Oil Co.*, 631 F.2d 1156 (5th Cir. 1980).

B. Although the fraudulent joinder allegation was not litigated, it existed by clear and convincing evidence

No legal test of the fraudulent joinder allegations made by Morton and Derise in their Notice of Removal was ever brought. It could be argued that Boutte's action

in dismissing those parties recognized their validity. Nevertheless, the fraudulent joinder allegation was meritorious on its face.

Boutte was alleged in the original Petition for Damages to be working within the course and scope of his employment with Morton International, Inc. at the time of his injury. Petition, paragraph 5. (App., p. 2). As such, Derise would be absolutely immune under Louisiana law to any suit by Boutte, a co-employee, unless Boutte could prove his actions amounted to a deliberate attempt to harm him. Louisiana R.S. 23:1032 et seq.; *cf., Bazley v. Tortorich*, 397 So.2d 475, 482 (La. 1981); *Caudle v. Betts*, 512 So.2d 389 (La. 1987).

Although Boutte couched Morton and Derise's actions as "intentional" in paragraph 7 of his original petition, those allegations sound in negligence. Specifically, Boutte alleges Morton and Derise to have "intended" acts such as "failing to provide a safe place to work . . . failing to provide safe equipment . . . ; failing to replace or repair defective equipment . . . ; breaching the duty owed to plaintiff . . . " Petition, paragraph 7. (App., p. 3)

Those allegations fall far short of the "intentional act" requirement to bypass Louisiana's statutory immunity. *Bazley v. Tortorich, supra; Caudle v. Betts, supra; Dycus v. Martin Marietta Corp.*, 568 So.2d 592, 595 (La. App. 4th Cir. 1990), *Writ Den'd*, 571 So.2d 649 (La. 1990); *Williams v. Gervais F. Favrot Co., Inc.*, 573 So.2d 533, 540 (La. App. 4th Cir. 1991).

On the face of the petition which was removed, then, fraudulent joinder is clearly and convincingly apparent

since no legal basis existed in Louisiana law for the relief sought by Boutte against Derise. Thus, at the time the lawsuit was removed, absent the fraudulently-joined defendants, complete diversity jurisdiction existed. *See also, Wilson v. Republic Iron & Steel Co., et al.*, 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921); *Tedder v. FMC Corp.*, 590 F.2d 115 (1979).

C. Neither consent nor waiver are valid issues

The District Judge's reasons denying the Motion to Vacate hinge on his interpretation of the action of prior counsel for Sellick, particularly representations made by current counsel that the remand order was apparently entered into without objection, and perhaps with the consent of, Sellick. However, even assuming this consent occurred, it is irrelevant.

Parties consenting to an illegal or unlawful action cannot be bound by that action. Parties may not, by stipulation, invest a court with jurisdiction over the subject matter of a cause which it would not otherwise have had. *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281 (1917). Likewise, the parties to an action may not stipulate for the determination thereof by the Court, in a manner contrary to the statutes or rules of Court. Thus, a stipulation by parties to remand, or consent to remand which is in direct contravention of the statute, is unenforceable.

Although the present circumstance is not as dramatic, there is no doctrinal difference between the "joint consent" of the parties here and that of husband and wife

colluding in a divorce action neither would be entitled by law to bring. *Hartigan v. Hartigan,* 128 So.2d 725 (Ala. 1961).

Equally, waiver is not an issue, but for different reasons. First, Boutte has never answered any pleading asserting Sellick has waived its right to have the remand order vacated due to the passage of time. Second, it is far from certain waiver can be used as a defense when the *ultra vires* nature of the order is beyond question.

Waiver is sparingly applied in removal cases. Thus, where a plaintiff delayed eight months in asking for a remand, and during that time used the facilities of the Federal Court, that combination of delay and deliberate invocation of federal jurisdiction was enough to constitute a waiver of any procedural defect in the removal. *Monaco v. Carey Canadian Mines, Ltd.,* 514 F.Supp. 357 (E.D. Penn. 1981).

If there is any additional question, it would be concerning the Court's inherent authority to "reopen a closed case." Technically, if the Order remanding was illegal, the case was not "closed" since it was so only as a result of an ultra vires order. But if it was, on recognizing its mistake, the District Court certainly could have granted the Motion in aid of its own jurisdiction under 28 U.S.C. 1651.

D. Conclusion and Relief Sought

This Court guards Congress' mandate of limited federal jurisdiction by consistently requiring adherence to the Legislative enactments which create it. This case was

properly before a United States District Court on subject matter jurisdiction. At the time the order complained of was entered, it was no more subject to remand than it would have been had it first been brought in Federal Court.

No Circuit has spoken to this issue. But the result in this case, if not the specific procedure, is directly opposite this Court's mandate in *Thermtron, supra.*

Petitioners previously argued that the remand order was entered "by mistake and inadvertence." While the written reasons of Judge Haik would seem to be mandate this is not so, "mistake" is certainly broad enough to encompass the result which obtained here. Neither this Court, nor any Circuit, has ruled on the question of "whether a district court has the authority to vacate a remand order which was entered by 'mistake and inadvertence' in the true sense of that phrase . . . ," although this specific question was reserved by the Fourth Circuit in *Three J Farms v. Alton Box Car Company,* 609 F.2d 112 (4th Cir. 1979).

The error of the District Court, and by extension, the Court of Appeals, may be remedied by the granting of this Writ. The issues are clear-cut and narrow enough to proceed without oral argument or further briefing.

Therefore, Petitioner urges the Court to grant this Writ of Certiorari; vacate the decision of the Court of Appeals for the Fifth Circuit; and remand to that Court with instructions to issue the Writ of Mandamus previously sought by Sellick, ordering the Honorable District

Judge to vacate his prior remand order and to place this case on his regular docket.

Respectfully submitted,

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JUDICIAL DISTRICT COURT
FOR THE PARISH OF IBERIA

STATE OF LOUISIANA

No. 73389 DIVISION "F" DOCKET NO. CV91-1556 LO

JOSEPH MILTON BOUTTE
VERSUS
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE,
AND SELLICK EQUIPMENT LIMITED

FILED: _____

_____
DEPUTY CLERK

Judge Haik
MAGISTRATE METHVIN

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes Joseph Milton Boutte, who for his Complaint respectfully represents that:

1.

The plaintiff in this case is Joseph Milton Boutte, a person of the full age of majority and resident of and domiciled in the Parish of Iberia, State of Louisiana.

2.

Made defendant herein is Morton International, Incorporated, a Louisiana Corporation authorized to do and doing business in the State of Louisiana. Defendant Morton International, Incorporated was the employer of plaintiff Joseph Milton Boutte at the time of the accident.

3.

Made defendant herein is James Derise, a person of the full age of majority and resident of and domiciled in the Parish of Iberia, State of Louisiana. Defendant James

Derise was the foreman that supervised plaintiff Joseph Milton Boutte at the time of the accident.

4.

Made defendant herein is Sellick Equipment Limited, an Ontario corporation authorized under the dominion of Canada. The principal place of business of defendant is 358 Erie Street, North Harrow, Ontario, Canada NOR1GO3.

5.

That on or about July 6, 1990, Plaintiff Joseph Milton Boutte while performing his duties within the scope of his employment for Morton International, Incorporated was aboard a Sellick platform which was elevated about twenty-two feet in the air, when the power rig manufactured by Sellick Corporation, ceased to function properly causing the operator of the platform to loose [sic] control thereby causing plaintiff fall approximately twenty-two feet to the ground. As a result, plaintiff was caused to suffer painful and permanent injuries which include but are not limited to a fractured pelvis and hip and severely wrenched and torn ligaments.

6.

Defendant Sellick Equipment Limited (hereafter called Sellick) is liable to plaintiffs under the provisions of the Louisiana Products Liability Act Number 64 of 1988, as codified at L.R.S. 9:2800.51 through 9:2800.59.

a. Defendant Sellick is liable to plaintiffs for damage proximately caused by the malfunction of the powder rig that rendered it unreasonably dangerous.

b. At he [sic] time of the accident plaintiff Joseph Milton Boutte was using the powder rig in the manner in which it was intended to be used.

c. The powder rig was unreasonably dangerous because of (i) defect in construction or composition, (ii) defective design, (iii) adequate warning has not been provided, and/or (iv) the powder rig did not conform to the express warranty of the manufacturer.

7.

Defendants Morton International, Incorporated and James Derise are liable for their intentional acts, which include but are not limited to the following:

a. Failing to provide a reasonably safe place to work;

b. Failing to provide safe equipment for plaintiff Joseph Milton Boutte to perform his work;

c. Failing to replace or repair defective equipment after both defendants Morton International, Incorporated and James Derise were aware of the defective equipment, which had caused a similar accident several weeks prior to the above referenced accident; and,

d. Breaching the duty owed to plaintiff Joseph Milton Boutte.

WHEREFORE, Plaintiff Joseph Milton Boutte prays:

a. That Defendants be cited and served with a copy of this petition, and be required to answer same, all in accordance with the law;

b. That after due delays and proceedings had there be [sic] judgment in favor of Plaintiffs and against the defendants, in solido, for such damages as are reasonable;

c. For all applicable statutory penalties;

d. For all costs of these proceedings;

e. For interest at the legal rate on sums due from the date of judicial demand until paid;

f. For general and equitable relief;

g. For trial by jury.

Respectfully submitted,

/s/ Victor R. Farrugia
Victor R. Farrugia, D.A. (19324)
David R. Fine (5561)
J. Murray Pinkston, III (17747)
FINE & ASSOCIATES
335 Decatur Street
New Orleans, Louisiana 70130
Telephone: 504/581-5152

PLEASE SERVE:

MORTON INTERNATIONAL, INCORPORATED
Through Its Agent For Service Of Process:
C.T. Corporation Systems
601 Poydras Street
New Orleans, Louisiana 70130

JAMES DERISE
Darnell Road
Lydia, Louisiana 70569

SELLICK EQUIPMENT LIMITED
C/O W. R. Sellick, President
358 Erie Street North
Harrow, Ontario N0R1G0

Filed July 8, 1991
Signed: LOUIS J. ILLEGIBLE, Dty. Clk.
A TRUE COPY.
ATTEST: /s/ Illegible
Illegible
Illegible

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE - OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	CIVIL ACTION
VERSUS	NO. CV91-1556L-O
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE and SELLICK EQUIPMENT LIMITED	SECTION " " MAGISTRATE ( ) /s/ Judge Haik MAGISTRATE METHVIN

NOTICE OF REMOVAL FROM 16TH JUDICIAL DISTRICT COURT PARISH OF IBERIA, STATE OF LOUISIANA

(Filed Jul. 26, 1991)

Petitioners, Morton International, Inc. and James Derise, the defendants above named, through its respective undersigned attorneys, respectfully show:

1.

A civil action was commenced on July 8, 1991 and is now pending in the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, wherein Joseph Milton Boutte is a plaintiff and petitioners are defendants, which action is designated by docket number 73389, Division "F" and is hereinafter sometimes referred to as "the state court action."

2.

Defendants desire to exercise their rights under the provisions of Title 28 U.S.C. §1441 *et seq.*, to remove this action from said state court to this Court.

3.

This is an action of a civil nature in which there exists diversity of citizenship between a non-fraudulently joined plaintiff and all non-fraudulently joined defendants, to wit (1) plaintiff is a Louisiana resident and citizen, and (2) defendant Morton International, Inc. is a corporation organized under the laws of the state of Indiana, is not incorporated in Louisiana, and has its principal place of business in Illinois. Defendant Sellick Equipment, Inc. is a Canadian corporation with its principal place of business in Canada. It has not been served as of the filing of this Notice. James Derise, a co-employee of plaintiff is a Louisiana resident, but who was fraudulently joined without a legal basis solely in an attempt to destroy diversity. No cause of action exists against a co-employee by virtue of the exclusive remedy provisions of the Louisiana Worker's Compensation Act, L.R.S. 23:1032. The amount in controversy, considering the serious bodily injury claims described in the complaint, exceeds $50,000 exclusive of interest and costs.

4.

Process in the aforesaid action was served on defendants/petitioners on July 15, 1991, and the petition in said state court action was first received by the defendant/petitioner on that same day. The date by which Morton International, Inc. and James Derise are required

by the Code of Civil Procedure of the State of Louisiana to plead to the petition in state court has not elapsed.

5.

A copy of all pleadings, process and orders served upon defendants/petitioners in said state court action is filed herewith.

WHEREFORE, defendants/petitioners pray that said state court action no. 73389 be removed from said state court to this Court and this Court accept jurisdiction on this action, and that henceforth this action be placed on the docket of this Court for further proceedings, the same as though the action had originally been instituted in this Court.

/s/ Darrell K. Cherry
ROBERT E. KERRIGAN, JR., T.A.
(Bar #7350)
DARRELL K. CHERRY
(Bar #4036)
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130-3672
Telephone: (504) 581-5141
Attorneys for Defendants, Morton International, Inc. and James Derise

CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of July, 1991, served a copy of the foregoing pleading on counsel

for plaintiff, by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ Darrell K. Cherry

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE - OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	CIVIL ACTION
VERSUS	NO. CV91-1556L-O
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE and SELLICK EQUIPMENT LIMITED	SECTION " " MAGISTRATE ( ) /s/ Judge Haik MAGISTRATE METHVIN

NOTICE

(Filed Jul. 26, 1991)

To: Victor R. Farrugia
Fine & Associates
335 Decatur Street
New Orleans, LA 70130
Attorney for Plaintiff

PLEASE TAKE NOTICE that Morton International, Inc. and James Derise, the defendants in the above-entitled action previously filed in the 16th Judicial District Court, Parish of Iberia, State of Louisiana, have on July 25, 1991 filed their notice of removal, a copy of which is attached hereto, in the United States District Court for the Western District of Louisiana, at Shreveport, Louisiana, in accordance with the provisions of Section 1446 of Title 28 of the United States Code.

You are also advised that said defendants, promptly after said filing of the notice of removal provided a copy thereof, together with a copy hereof, to the Clerk of the

16th Judicial District Court for filing pursuant to Subsection (d) of said Section 1446 of Title 28.

New Orleans, Louisiana, July 25, 1991.

/s/ Darrell K. Cherry
ROBERT E. KERRIGAN, JR., T.A.
(Bar #7350)
DARRELL K. CHERRY
(Bar #4036)
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130-3672
Telephone: (504) 581-5141
Attorneys for Defendants, Morton International, Inc. and James Derise

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of defendants' Notice of Removal of the above-entitled action for the 16th Judicial District Court, Parish of Iberia, which has been filed with this Court on the 25th day of July, together with defendants' written notice of such filing addressed to the attorney of record for plaintiff herein, have been served on plaintiff this date by mailing same to his attorney of record at Victor R. Farrugia, Fine & Associates, 335 Decatur Street, New Orleans, LA 70130.

/s/ Darrell K. Cherry

UNTIED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

6:91CV01556 JUDGE HAIK
BOUTTE V. MORTON INTL
INC, ET AL MAGISTRATE METHVIN

ORDER OF DISMISSAL

(Filed Mar. 12, 1992)

Considering the failure of plaintiffs to prosecute this action against defendant SELLICK EQUIPMENT LTD. under ULLR 11.02W of the Western District of Louisiana.

IT IS ORDERED that this action be and is hereby dismissed without prejudice against defendant SELLICK EQUIPMENT LTD. This action may be reinstated within thirty (30) days for good cause shown.

Shreveport, Louisiana, on this 11th day of March, 1992.

/s/ Robert H. Shemwell
ROBERT H. SHEMWELL
Clerk of Court

COPY SENT
Date: 3/12/92
By: Illegible
To: Kerrigan
Farrugia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	*	CIVIL ACTION
VS.	*	NO.:CV-91-1556
MORTON INTERNATIONAL, INC., ET AL	*	JUDGE HAIK MAG.METHVIN

****

PLAINTIFF'S MOTION TO REINSTATE COMPLAINT

(Filed Apr. 9, 1992)

Plaintiff, through the undersigned counsel, moves to reinstate the complaint against Sellick Equipment Limited, for the following reasons:

1) The Court dismissed the complaint against Sellick Equipment under Rule 11.02 on March 11, 1992, based on failure to prosecute.

2) This assumption of a failure to prosecute was based on the apparent lack of an answer in the record for Sellick.

3) However, Sellick has indeed answered the suit in the state court proceeding and is in the process of conducting discovery. See Exhibits A & B, attached.

4) The complaint should therefore be reinstated against Sellick Equipment International.

/s/ Illegible
RICHARD L. DUCOTE, TA
(5111)
DAVID R. FINE (5561)
FINE & ASSOCIATES
335 Decatur Street
New Orleans, Louisiana 70130
(504) 581-5152

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served on counsel for all parties by depositing same in the United States Mail this 8 day of April 1992
/s/ Illegible

16TH JUDICIAL DISTRICT COURT

PARISH OF IBERIA

STATE OF LOUISIANA

JOSEPH MILTON BOUTTE	*	DOCKET NUMBER 73,389
VERSUS		
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE, and SELLICK EQUIPMENT LIMITED	*	DIVISION "F"

****

ANSWER

NOW INTO COURT, through undersigned counsel, comes SELLICK EQUIPMENT LIMITED, purportedly made defendant herein, who respectfully represents the following:

1.

For lack of sufficient information to justify a belief therein, the allegations of paragraphs 1, 2, 3 and 7 are denied.

2.

Respondent admits its status as alleged in paragraph 4.

3.

Respondent denies the allegations of paragraph 5 and 6.

4.

Respondent alleges the fall of Joseph Milton Boutte as the cause of the accident sued upon herein.

5.

Respondent avers and is entitled to a trial by jury as to all issues herein.

WHEREFORE, RESPONDENT, SELLICK EQUIPMENT LIMITED, PRAYS that this answer be deemed good and sufficient, and after all legal proceedings have been had, there be judgment rendered in favor of respondent, rejecting plaintiff's demand at plaintiff's cost.

RESPONDENT FURTHER PRAYS for trial by jury as to all issues herein.

BY ATTORNEYS,

LAW OFFICES OF GRACELLA SIMMONS

BY: /s/ Michael D. Zelden
MICHAEL D. ZELDEN
4324 S. Sherwood Forest Blvd.
Suite 150-A
Baton Rouge, LA 70816
(504) 291-0960

ORDER

The foregoing considered:

IT IS ORDERED that the above entitled and numbered suit be tried by a civil jury upon the defendant giving bond, with good and solvent surety, conditioned

as the law directs, in the amount of $ ___, to cover the additional costs of the jury trial.

_____, Louisiana, this ___ day of _____, 1991.

_____

JUDGE - 16TH JUDICIAL
DISTRICT COURT

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Answer has been served upon counsel for all parties involved in this proceeding by mailing same to each this date by First Class United States mail, properly addressed, and postage prepaid.

Baton Rouge, Louisiana, this 25th day of September, 1991.

/s/ Michael D. Zelden
MICHAEL D. ZELDEN

16TH JUDICIAL DISTRICT COURT

PARISH OF IBERIA

STATE OF LOUISIANA

JOSEPH MILTON BOUTTE	*	DOCKET NUMBER 73,389
VERSUS		
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE, and SELLICK EQUIPMENT LIMITED	*	DIVISION "F"

****

REQUEST FOR NOTICE OF DATE OF TRIAL, ETC.

TO THE CLERK OF COURT for the 16th Judicial District Court in and for the Parish of Iberia, Louisiana.

Please take notice that Michael D. Zelden, attorney for defendant, do hereby request written notice of the date of trial of the above matter as well as notice of hearings (whether on merits or otherwise), orders, judgments and interlocutory decrees, and any and all formal steps taken by the parties herein, the judge or any member of court, as provided in Louisiana Code of Civil Procedure of 1960, particularly articles 1572, 1913 and 1914.

BY ATTORNEYS,

LAW OFFICES OF
GRACELLA SIMMONS

BY: /s/ Michael D. Zelden
MICHAEL D. ZELDEN,
BAR ROLL # 13786
4324 S. Sherwood Forest Blvd.
Suite 150-A
Baton Rouge, LA 70816
(504) 291-0960

16TH JUDICIAL DISTRICT COURT

PARISH OF IBERIA

STATE OF LOUISIANA

JOSEPH MILTON BOUTTE	*	DOCKET NUMBER 73,389
VERSUS		
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE, and SELLICK EQUIPMENT LIMITED	*	DIVISION "F"

****

INTERROGATORIES

TO: JOSEPH MILTON BOUTTE
through his attorney of record,
VICTOR R. FARRUGIA
335 Decatur Street
New Orleans, LA 70130

NOW INTO COURT, through undersigned counsel, comes defendant, SELLICK EQUIPMENT LIMITED who propounds the following interrogatories to plaintiff to be answered within the legal delays allowed.

INTERROGATORY NO. 1.

Give a brief description of how the accident occurred which is the basis of this lawsuit.

INTERROGATORY NO. 2.

Give the names and addresses of all witnesses to the accident.

INTERROGATORY NO. 3.

With regard to any medical treatment, please specify the following:

a) The name and address of any doctor consulted;

b) All dates of consultation;

c) The charge for each consultation;

d) The names of all doctors who have rendered a report to you or to any representative of yours and list the date of each report rendered by each physician; and

e) Attach to the copy of the answers to these interrogatories copies of all medical reports rendered by the physicians who have examined or treated you since the date of the accident sued upon.

INTERROGATORY NO. 4.

With regard to any hospitalization, please specify:

a) The name and address of any hospital in which you were treated or confined;

b) The date of any treatment or confinement in any hospital listed in (a) above; and

c) The charge for any treatment or confinement in any hospital listed in (a) above.

INTERROGATORY NO. 5.

With regard to any drug, please specify:

a) The name of the drug;

b) By whom prescribed;

c) By whom and when filled.

d) The charge.

INTERROGATORY NO. 6.

Please specify all injuries claimed to have been sustained as a result of this accident.

INTERROGATORY NO. 7.

Please state whether or not you have been involved in any accidents prior to the accident forming the basis of this lawsuit, and if the answer is in the affirmative, state the following:

a) The date of said accident.

b) The injuries received in said accident.

c) The doctor or doctors who rendered medical treatment in connection with these injuries, including their names, addresses, and dates of treatment.

d) Whether or not you are still receiving any medical care in connection with these injuries.

e) Whether or not any lawsuit was filed in connection with said accident and if yes, the name of the attorney representing you, and the location where the lawsuit was filed.

INTERROGATORY NO. 8.

At the time of the accident sued upon herein were you under any doctors care for any medical reason whatsoever. If the answer is in the affirmative, state the following:

a) The name and address of the doctor.

b) The medical reason for which you were receiving treatment.

c) The name of any drugs which you were taking at the time of the accident.

INTERROGATORY NO. 9.

Since the date of the accident sued upon herein, state whether or not you have been involved in any other accidents in which you received injuries, and if the answer is in the affirmative, state the following:

a) The name and address of the doctor;

b) The medical reason for which you were receiving treatment;

c) The name of any drugs which you were taking at the time of the accident.

INTERROGATORY NO. 10.

State whether or not you were employed at the time of the accident, and if the answer is in the affirmative, state the following:

a) The name of your employer;

b) The date you were first employed;

c) Your position; and

d) Your rate of pay.

INTERROGATORY NO. 11.

If you are employed at the present time, state the following:

a) The name of your employer;

b) The date you were first employed;

c) Your position; and

d) Your rate of pay.

INTERROGATORY NO. 12.

Give the dates you missed work following the accident sued upon which you allege were the result of injuries you received in the accident. List the names and addresses of your employer's for the last five years and state the position you held with each employer.

INTERROGATORY NO. 13.

With regard to any other special damage, please specify the damage, date, and amount.

INTERROGATORY NO. 14.

State the names and addresses of all lay witnesses you intend to call to testify in this matter and provide the basis substance of their testimony.

INTERROGATORY NO. 15.

State the names and addresses of all non-medical experts that you have consulted with in connection with this litigation.

INTERROGATORY NO. 16.

State the name and address of all experts, both medical and non-medical, whom you intend to call as witnesses in the trial of this matter.

INTERROGATORY NO. 17.

State, with specificity, the exhibits which you intend to introduce at the trial of this matter.

These interrogatories are to be deemed continuing so as to require supplemental answers, under oath, in writing, at any time that additional information may be obtained after responses are filed to these interrogatories which would be furnished if the interrogatories were continuously repeated.

BY ATTORNEYS,

LAW OFFICES OF
GRACELLA SIMMONS

BY: /s/ Michael D. Zelden
MICHAEL D. ZELDEN,
BAR ROLL #13786
4324 S. Sherwood Forest Blvd.
Suite 150-A
Baton Rouge, LA 70816
(504) 291-0960

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Interrogatories has been served upon counsel for all parties involved in this lawsuit by mailing same to each this date by First Class United States mail, properly addressed, and postage prepaid, Baton Rouge, Louisiana, Baton Rouge, Louisiana, this 25th day of September, 1991.

/s/ Michael D. Zelden
MICHAEL D. ZELDEN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	*	CIVIL ACTION
	*	
VS.	*	NO.:CV-91-1556
	*	
MORTON INTERNATIONAL, INC., ET AL	*	JUDGE HAIK MAG.METHVIN

****

ORDER

(Filed APR 13 1992)

The foregoing considered, IT IS ORDERED that the complaint against Sellick International be reinstated.

Date: April 13, 1992 /s/ R.A. Haik
DISTRICT JUDGE

Issue must be joined within 30 days by answer filed or request for default judgment or case will again be dismissed.

/s/ R.A. Haik

COPY SENT
DATE 4-13-92
BY /s/ MS
TO: Kerrigan
Farrugia
RVW

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	CIVIL ACTION
VERSUS	NO. 91-1556 L-O
	JUDGE HAIK
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE and SELLICK EQUIPMENT LIMITED	MAGISTRATE METHVIN

EX PARTE MOTION TO DISMISS PLAINTIFF'S CLAIMS AGAINST MORTON INTERNATIONAL, INC. AND JAMES DERISE

(Filed APR 27 1992)

NOW INTO COURT, through undersigned counsel, comes Joseph Milton Boutte, who moves the Court to dismiss, by way of non suit and without prejudice, all claims that he has made against Morton International, Inc. and James Derise. Plaintiff's claims against the remaining defendant, Sellick Equipment Company are expressly reserved.

As set forth in the accompanying Certificate, counsel for Morton International, Inc. has been contacted concerning this motion and has no opposition. Similarly, counsel representing the remaining defendant, Sellick

Equipment Limited, has likewise been contacted and has no opposition to the granting of the motion.

Respectfully submitted,

/s/ Richard L. Ducote
RICHARD L. DUCOTE (5111)
DAVID R. FINE (5561)
J. MURRAY PINKSTON, III (17747)
FINE & ASSOCIATES
335 Decatur Street
New Orleans, Louisiana 70130
Telephone: 504/581-5152
Attorneys for Plaintiff,
Joseph Milton Boutte

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record, by United States mail, properly addressed and first class postage prepaid, this 21st day of April, 1992.

/s/ Illegible

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOSEPH MILTON BOUTTE	CIVIL ACTION
VERSUS	NO. 91-1556 L-O
	JUDGE HAIK
MORTON INTERNATIONAL INCORPORATED, JAMES DERISE and SELLICK EQUIPMENT LIMITED	MAGISTRATE METHVIN

ORDER

(Filed APR 29 1992)

Considering the motion of plaintiff, Joseph Milton Boutte to dismiss, without prejudice, his claims against Morton International, Inc. and James Derise;

IT IS HEREBY ORDERED that the claims of plaintiff, Joseph Milton Boutte against Morton International, Inc. and James Derise in this matter is hereby DISMISSED, without prejudice, each party to bear its own court costs. All claims against the remaining defendant, Sellick Equipment, Ltd. are specifically reserved to plaintiff.

Lafayette, Louisiana this 28th day of April, 1992.

COPY SENT
DATE 4-29-92
BY /s/ MS
TO: Kerrigan
Farrugia
MB
RVW

/s/ R.A. Haik
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

JOSEPH MILTON BOUTTE	*	CIVIL ACTION
	*	
VS.	*	NO.: CV-91-1556
	*	
MORTON INTERNATIONAL, INC. ET AL	*	JUDGE HAIK MAG.METHVIN
	*	

****

PLAINTIFF'S MOTION TO REMAND

(Filed MAY 5 1992)

Plaintiff Joseph Boutte, through the undersigned counsel, moves to remand this case to the Louisiana state court of origin, the 16th Judicial District Court, Parish of Iberia, as the Petitioners in removal, Morton International and James Derise, have been dismissed as defendants and the remaining defendant, Sellick Equipment Ltd., and the plaintiff desire to litigate this case in the state court. Counsel for Sellick is concurrently filing his consent to the remand.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleadings has been served on counsel for all parties by depositing same in the United States Mail this 4 day of May 1992

/s/ Richard L. Ducote

/s/ Richard L. Ducote
RICHARD L. DUCOTE (5111)
DAVID R. FINE (5561)
FINE & ASSOCIATES
335 Decatur Street
New Orleans, Louisiana 70130
(504) 581-5152

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

JOSEPH MILTON BOUTTE	*	CIVIL ACTION
	*	
VS.	*	NO.: CV-91-1556
	*	
MORTON INTERNATIONAL, INC. ET AL	*	JUDGE HAIK
	*	MAG.METHVIN
	*	

****

ORDER

(Filed MAY 5 1992)

The foregoing considered, IT IS HEREBY ORDERED that this case be remanded to the 16th Judicial District Court, Parish of Iberia, State of Louisiana.

Date: May 5, 1992 /s/ R.A. Haik
Lafayette Louisiana DISTRICT JUDGE

COPY SENT
DATE 5-5-92
BY /s/ MS
TO: Farrugia
Cherry
Ducote
Mem
MB
RVW

16th JDC
w/notice, ds

U. S. DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE – OPELOUSAS LOUISIANA

JOSEPH M. BOUTTE	:	DOCKET NO.: CV-91-1556 L-O
MORTON INTERNATIONAL, INC., JAMES DERISE and SELLICK EQUIPMENT LIMITED	:	JUDGE HAIK
	:	MAGISTRATE METHVIN

****

MOTION TO VACATE REMAND ORDER

(Filed AUG 27 1993)

NOW INTO COURT, through their undersigned counsel, comes SELLICK EQUIPMENT LIMITED, who moves this Honorable Court to vacate its Order entered on the 5th day of May, 1992, the said Order having been entered beyond this Honorable Court's authority; thus, the said Order is null and void and must be declared so by this Court, and this cause reinstated in this Court.

WHEREFORE, MOVERS PRAY that this Honorable Court set a date and time for hearing at which to determine whether the Motion to Vacate filed herein should be granted as a matter of law.

RESPECTFULLY SUBMITTED,

WOODLEY, WILLIAMS,
FENET, BOUDREAU,
NORMAN & BROWN

BY: /s/ Todd M. Ammons
JAMES B. DOYLE
LA BAR ROLL NO.: 5061
TX BAR ROLL NO.: 0609 2500
1003 HUGH WALLIS ROAD
BUILDING I
LAFAYETTE, LA 70508
(318) 265-3915
(318) 433-6328

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for plaintiff, Richard Ducote and Darrell Cherry, by mailing the same to each properly addressed and postage prepaid on this 24 day of August, 1993.

/s/ Todd M. Ammons
JAMES B. DOYLE

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS LOUISIANA

JOSEPH M. BOUTTE	:	DOCKET NO.:
MORTON INTERNATIONAL, INC., JAMES DERISE and SELLICK EQUIPMENT LIMITED	:	CV-91-1556 L-O
	:	JUDGE HAIK
	:	MAGISTRATE METHVIN

MEMORANDUM IN SUPPORT OF MOTION TO VACATE REMAND ORDER

(Filed Aug. 27, 1993)

MAY IT PLEASE THE COURT:

SELLICK EQUIPMENT LIMITED is a Canadian Corporation which was named as a defendant in a suit first pending in the 16th Judicial District Court for the Parish of Iberia, which was removed to this Honorable Court upon Motion of defendants, Morton International, Inc. and James Derise.

The suit was filed on the 8th of July, 1991. On the 26th of July, 1991, Morton and Derise removed it, asserting jurisdiction existed in this Court pursuant to 28 U.S.C. 1332. On the 5th of August, 1991, Morton filed an answer to that Complaint. On the 6th of August 1991, mover SELLICK was served through the Secretary of State of the State of Louisiana.

On the 12th of March, 1992, service having been had against SELLICK but no action having been taken against that defendant by the plaintiff, plaintiff's case against

SELLICK was dismissed pursuant to ULLR 11.02(W) by Robert H. Shemwell, Clerk of Court.

On the 13th day of April, 1992, plaintiff filed a Motion to Reinstate the claim against SELLICK and annexed to that Motion a copy of an Answer SELLICK had filed in the State Court pleadings after removal had been accomplished. However, SELLICK had entered no appearance in the removed suit and in fact, the Order that this Court entered on April 13, 1992, reinstating the action against SELLICK, specifically required that issue as to SELLICK "must be joined within thirty (30) days by answer filed or request for default judgment or the case will again be dismissed."

On the 27th of April, 1992, plaintiff moved *ex parte* to dismiss Morton and Derise, the original removing defendants. Plaintiff specifically and expressly reserved any claims against SELLICK, which was described as "the remaining defendant . . . " Although the motion represents that SELLICK had been contacted and voiced no opposition to the granting of the Motion for Non-Suit, no appearance had as of that date been entered by SELLICK in the District Court action.

On the 5th of May, 1992, nearly eleven months after the removal petition, plaintiff filed a Motion to Remand without citing statutory or other grounds for remand; representing that counsel for SELLICK, who still had entered no appearance in the District Court suit, was "concurrently filing his consent to the remand," a document which is conspicuously absent from the record; and this court signed the Order.

SELLICK maintains that this Honorable Court's Order of the 5th of May, 1992, exceeded the District Court's authority; is, therefore, a nullity; and as the Order can have no effect, this matter must be reinstated on the civil docket and set for hearing in the ordinary course of events.

I. NO BASIS EXISTED FOR REMAND OF THIS CAUSE TO STATE COURT

The question now before the Court is whether a United States District Court has the authority to remand a properly removed suit, over which it has subject matter jurisdiction of the one remaining defendant, when the only cause given in the Motion is that the remand should be accomplished for the convenience of the parties. Stated another way, the query is: May parties to a lawsuit combine to deprive the Federal Court of jurisdiction by consent?

Clearly, the contrary question, whether parties can combine to confer jurisdiction upon the District Court, is answered in the negative, *e.g., A.L. Rowan & Son v. Department of Housing & Urban Development,* 611 F. 2d 997 (5th Cir. 1988). In this case, no clause of 28 U.S.C. 1447(c) is cited, or even referenced by implication, in the plaintiff's Motion to Remand. The United States Supreme Court has held that such an Order is not immune from review. *Thermtron Products, Inc. v. Hermans-dorfer,* 96 S.Ct. 584, 423 U.S. 336, (46 L.Ed. 2d 542 (1976)).

In that case, apparently on its own Motion, a Federal District Judge remanded a properly removed diversity case when his docket was too crowded. Where there is an

abuse of the authority granted to the District Court in 28 U.S.C. 1447 for remand, it was held that the extraordinary remedy of Writ of Mandamus could be applied to force the District Judge to continue his jurisdiction over that case.

Here, the situation is strikingly similar. It is undisputed that at the time this Court signed the remand Order, SELLICK had been served, and its presence in the case did not destroy the subject matter jurisdiction conferred upon the Court by 28 U.S.C. 1332 and designated as such in the removal petition. The parties implicitly, if not explicitly, recognized SELLICK'S position in the removed case, by reinstating the original action against SELLICK after it had been dismissed under the local rules for non-prosecution, and then by specifically reserving rights against SELLICK in the Federal Court pleading which dismissed Morton and Derise.

If the failure of Morton to join SELLICK in its original removal of the case was a defective use of 28 U.S.C. 1441, that defect was waived when plaintiff waited more than thirty days to move to remand the suit. 28 U.S.C. 1447(c). The Motion to Remand could not fit under any statutory "cubbyhole" of 1447(c) and this court is vested with no more authority to remand a case when the parties consent to its remand than it is to remand a case when its docket is so crowded that it feels it must do so in the interest of justice. *Thermtron, supra.*

II. WAIVER – PROCEDURAL POSTURE OF THIS MOTION

Plaintiff may oppose this Motion on the basis that SELLICK has waived its right to complain, since it took no further action to remove the suit after the "remand" at issue, or to appeal the remand order. But as pointed out by Professor Wright: "Courts are slow to find such a waiver, even when the complaining defendant had taken action in state court and then sought removal of the action." *Wright, Law of the Federal Courts,* Student Ed. 1984, Section 38, pg. 218.

In any case, SELLICK could not participate in an act which attempted to cloak this court with an authority not conferred upon it by statute.

As to the additional question, that is, whether a closed case can be reopened, we contend this Court's general equitable powers, particularly those in aid of its own jurisdiction, may be invoked to overturn an erroneously-entered invalid Order.

In the event, this case is different from *Three J Farms, Inc. v. Alton Box Car Company,* 609 F. 2d. 112 (4th Cir. 1979). There, the District Court remanded a case without giving the removing defendants an opportunity to argue their position. The Court stated this was done "by mistake and inadvertence." While giving lip service to the principle of review as enunciated by *Thermtron,* the remand accomplished by the Judge in *Three J* was done pursuant to Section 1447(c), or at least purported to be.

But the circuit court distinctly reserved for a later case the question of "whether a district court has the

authority to vacate a remand order which was entered by 'mistake and inadvertence' in the true sense of that phrase . . . " No other case has raised this question, and none has resolved it.

CONCLUSION

We urge this Court to recognize what occurred in this case for what it is: a mistake. As no statutory authority was cited, this Court was without authority to remand this case to the 16th Judicial District Court of the Parish of Iberia. The correct procedural remedy is for this Court to vacate that Order and reinstate this action in Federal Court.

RESPECTFULLY SUBMITTED,

WOODLEY, WILLIAMS, FENET,
BOUDREAU, NORMAN & BROWN

BY: /s/ Todd M. Ammons
JAMES B. DOYLE
LA BAR ROLL NO.: 5061
TX BAR ROLL NO.:
0609 2500
1003 HUGH WALLIS ROAD
BUILDING I
LAFAYETTE, LA 70508
(318) 265-3915
(318) 433-6328

DOYLE\CLAS\14236.PLD

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for plaintiff, Richard Ducote

and Darrell Cherry, by mailing the same to each properly addressed and postage prepaid on this 24th day of August, 1993.

/s/ Todd M. Ammons
JAMES B. DOYLE

doyle\clas\14236.pld

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS DIVISION

JOSEPH M. BOUTTE	:	CIVIL ACTION
VERSUS	:	NUMBER 91-1556 L-O
MORTON INTERNATIONAL INC., JAMES DERISE and SELLICK EQUIPMENT LIMITED	:	JUDGE HAIK
	:	MAGISTRATE JUDGE METHVIN

ORDER

(Filed Oct. 18, 1993)

IT IS ORDERED that defendant, Sellick International's, Motion to Vacate Remand Order is denied.

THUS DONE AND SIGNED in Lafayette, Louisiana on this 15thth day of October, 1993.

/s/ R T Haik
HONORABLE RICHARD T. HAIK
U.S. DISTRICT JUDGE

COPY SENT
DATE 10-20-93
BY cag
TO: Doyle
Farrugia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS DIVISION

JOSEPH M. BOUTTE	:	CIVIL ACTION
VERSUS	:	NUMBER 91-1556 L-O
MORTON INTERNATIONAL INC., JAMES DERISE and SELLICK EQUIPMENT LIMITED	:	JUDGE HAIK
	:	MAGISTRATE JUDGE METHVIN

REASONS FOR JUDGMENT ON MOTION TO VACATE REMAND ORDER

(Filed Oct. 18, 1993)

Defendant, Sellick Equipment Limited, moves that this court vacate its May 5, 1992 order which remanded the above-captioned case to the 16th Judicial District for the Parish of Iberia, New Iberia, Louisiana.

On May 4, 1992 this court signed an order pursuant to plaintiff, Joseph Boutte's, motion for a remand. The motion stated, "Sellick Equipment Ltd. and the plaintiff desire to litigate this case in state court." On October 13, 1993 Judge Richard T. Haik held a telephone conference with plaintiff's counsel, Richard L. Ducote, and defendant's counsel, James B. Doyle. During this conference, Mr. Doyle stated that it was his impression that Michael Zelden, his predecessor as Sellick Equipment Inc.'s attorney, concurred with plaintiff's attorney in the May 4, 1992 motion for remand.

The court finds that at the time of the May 1992 remand of this case, the defendant desired to remand the

case to the 16th Judicial District of Iberia Parish. In addition to the consent of the parties at the time of the remand, the lengthy delay in applying to vacate the order gives further support for this denial. Accordingly, this court will not vacate its May 5, 1992 order.

THUS DONE AND SIGNED in Lafayette, Louisiana on this 15thth day of October, 1993.

/s/ Richard T. Haik
HONORABLE RICHARD T. HAIK
U.S. DISTRICT JUDGE

COPY SENT
DATE 10-20-93
BY cag
TO: Doyle
Farrugia
Kerrigan

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO._____

IN RE SELLICK EQUIPMENT, INC.

PETITIONERS

VERSUS

THE HONORABLE RICHARD T. HAIK AND JOSEPH BOUTTE,

RESPONDENTS

ON APPLICATION OF SELLICK EQUIPMENT, INC. APPLYING FOR WRITS OF MANDAMUS, CERTIORARI AND PROHIBITION

APPLICATION FOR WRIT OF MANDAMUS
SELLICK EQUIPMENT LIMITED –
DEFENDANT/APPLICANT

JAMES B. DOYLE
LA BAR ROLL NO.: 5061
TX BAR ROLL NO.: 06092500
MICHAEL G. HODGKINS
LA BAR ROLL NO.: 20862
WOODLEY, WILLIAMS, FENET, BOUDREAU, NORMAN & BROWN
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P. O. DRAWER EE
LAKE CHARLES, LA 70602
(318) 433-6328
ATTORNEYS FOR SELLICK EQUIPMENT LIMITED PETITIONER

UNITED STATES COURT OF APPEAL

FIFTH CIRCUIT

IN RE SELLICK EQUIPMENT, INC.
PETITIONER
THE HONORABLE RICHARD T. HAIK AND
JOSEPH BOUTTE
RESPONDENTS

ON APPLICATION OF SELLICK EQUIPMENT, INC. APPLYING FOR WRITS OF MANDAMUS, CERTIORARI AND PROHIBITION

SELLICK EQUIPMENT, INC., defendant in Cause No. CV 91-156-L-O, captioned as JOSEPH BOUTTE, plaintiff, vs. Morton International, James Derise and SELLICK EQUIPMENT, INC., defendant, in the United States District Court for Western District hereby petitions this Honorable Court to issue a Writ of Mandamus directing the Honorable Richard T. Haik, United States Court Judge to vacate the remand order signed by him on the 5th day of May, 1992, and reinstate the said action on the civil docket of that Court.

/s/ James B. Doyle
JAMES B. DOYLE
LA BAR ROLL NO.: 5061
TX BAR ROLL NO.: 06092500
MICHAEL G. HODGKINS
LA BAR ROLL NO.: 20862
WOODLEY, WILLIAMS, FENET, BOUDREAU, NORMAN & BROWN
500 KIRBY STREET
P. O. DRAWER EE
LAKE CHARLES, LA 70602
(318) 433-6328
ATTORNEYS FOR SELLICK EQUIPMENT LIMITED
PETITIONER

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

(1) James B. Doyle, Donald C. Brown, & Michael G. Hodgkins; Woodley, Williams, Fenet, Boudreau, Norman & Brown, 500 Kirby Street, P. O. Drawer EE, Lake Charles, Louisiana 70602 (318) 433-6328, Attorneys for Sellick Equipment Limited, Defendant/Petitioner.

(2) Richard Ducote, 335 Decatur Street, New Orleans, Louisiana 70130, (504) 581-5152, Attorney for Joseph M. Boutte, Respondent/Appellant.

(3) Darrell Cherry; Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana 70130, (504) 581-5141, Attorneys for Morton International, Inc. and James Derise, Defendant.

(4) Honorable Richard T. Haik, United States Western District Judge, Lafayette – Opelousas Division, 213 Federal Building, 705 Jefferson Street, Lafayette, Louisiana, 70501, (318) 262-6875.

/s/ James B. Doyle
JAMES B. DOYLE
MICHAEL G. HODGKINS

STATEMENT REGARDING ORAL ARGUMENT

Sellick Equipment Limited does not request oral arguments.

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STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is found in the All Writs Act, 28 U.S.C. 1651, and upon the authority of this Court to hear ordinary appeals under 28 U.S.C. 1291. The jurisdiction of the District Court was alleged pursuant to 28 U.S.C. 1332, there being complete diversity of citizenship among the parties, and the amount in controversy having been satisfied.

STATEMENT OF THE ISSUES

1. Does a United States District Court have the authority to remand a properly removed suit, over which it retains subject matter jurisdiction, when the only cause given for the remand is that it should be accomplished for the convenience of the parties?

2. May a United States District Judge remand a case without any referenced ground for the remand under 28 USC 1447(c), but solely based upon the "consent" of the parties?

3. May parties deprive a United States District Court of subject matter jurisdiction by consent?

SYLLABUS OF THE LAW

I. A district court which remands a removed diversity lawsuit on any grounds other than the case having been removed "improvidently and without jurisdiction" exceeds its statutory authority *Thermtron Products, Inc. v. Hermansdorfer*, 96 S. Ct. 584, 423 U.S. 336, 46 L.Ed. 2d. 542 (1976); 28 USC 1447(c).

II. Mandamus is the proper remedy to compel the District court to vacate its previous, erroneously-issued order of remand, and to reinstate this action in the District Court, *In re Wilson Industries, Inc.*, 886 F.2d 93 (5th Cir. 1989); *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124 (5th Cir. 1982) (per curim [sic]); *In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642 (5th Cir. 1978); *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11 Cir. 1992); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Thermtron, Supra.*

STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES PRESENTED BY THIS APPLICATION

SELLICK EQUIPMENT LIMITED is a canadian corporation named as a defendant in a suit first pending in the 16th Judicial District Court for the Parish of Iberia, which was removed to the United States District Court for the Western District of Louisiana upon Motion of defendants, Morton International, Inc. and James Derise. Sellick had not been served at the time of removal, and never joined in it.

The suit was filed on the 8th of July, 1991. On the 26th of July, 1991, Morton and Derise removed it, asserting federal subject matter jurisdiction existed pursuant to 28 U.S.C. 1332. On the 5th of August, 1991, Morton filed an answer to the Complaint. On the 6th of August 1991, mover SELLICK was served through the Secretary of State of the State of Louisiana.

On the 12th of March, 1992, service having been had against SELLICK but no action having been taken against

that defendant by the Respondent Boutte, his case against SELLICK was dismissed pursuant to ULLR 11.02(W) by Robert H. Shemwell, Clerk of Court.

On the 13th day of April, 1992, Respondent Boutte filed a Motion to Reinstate the claim against SELLICK and annexed to that Motion a copy of an Answer SELLICK had filed in the State Court pleadings after removal had been accomplished. However, SELLICK entered no appearance in the removed suit and in fact, the Order entered on April 13, 1992, reinstating the action against SELLICK, specifically required issue as to SELLICK "must be joined within thirty (30) days by answer filed or request for default judgment or the case will again be dismissed."

On the 27th of April, 1992, Respondent Boutte moved *ex parte* to dismiss Morton and Derise, the original removing defendants. He specifically and expressly reserved any claims against SELLICK, which was described as "the remaining defendant . . . " Although the motion represents that SELLICK had been contacted and voiced no opposition to the granting of the Motion for Non-Suit, no appearance had been entered by SELLICK in the District Court action.

On the 5th of May, 1992, nearly eleven months after the removal petition, Respondent Boutte filed a Motion to Remand without citing statutory or other grounds therefor; representing that counsel for SELLICK, who still had entered no appearance in the District Court suit, was "concurrently filing his consent to the remand," a document which is conspicuously absent from the record; and

the Respondent District Judge Richard Haik signed the Order.

SELLICK maintains Respondent Judge Haik's Order of the 5th of May, 1992, exceeded his statutory authority under 28 USC 1447(c); is, therefore, a nullity; and as the Order can have no effect, this matter must be reinstated on his civil docket.

On the 27th day of August, 1993, SELLICK filed a Motion to Vacate the Remand Order previously entered by Respondent Judge Haik. The matter was scheduled for hearing, and Judge Haik chose to have a telephone conference with the attorneys involved before issuing his ruling. In his Written Reasons for Ruling, Judge Haik did make note of the fact that the parties SELLICK and BOUTTE had apparently consented to the remand at the time the Order was originally entered, and made note in his reasons about specifically questioning current counsel for SELLICK on this point. That apparent consent formed the major thrust of Judge Haik's reasons for denying the Motion to Vacate the Remand Order previously entered, with those written reasons being filed on the 18th day of October, 1993, and mailed to counsel on 20th October, 1993.

It is from the Order of Judge Haik denying the Motion to Vacate the Remand Order previously entered that this application for Writ of Mandamus proceeds. Among other things, SELLICK takes the position that, even if prior counsel for SELLICK had consented to the remand, the Respondent District Judge still did not have the authority to sign the Order under 28 USC 1447(c).

ARGUMENT AND LAW SUPPORTING THE ISSUANCE OF THIS WRIT

NO STATUTORY BASIS EXISTED FOR REMAND OF THIS CAUSE TO STATE COURT

The question now before the Court is whether a United States District Judge has the authority to remand a properly removed suit, over which it has subject matter jurisdiction of the one remaining defendant, when the only cause given by the Court was that the remand was concurred in by both parties. Stated another way, the query is: May parties to a lawsuit combine to deprive the Federal Court of jurisdiction by consent?

Clearly, the contrary question, whether parties can combine to confer jurisdiction upon the District Court, is answered in the negative. See, *e.g., A.L. Rowan & Son v. Department of Housing & Urban Development*, 611 F. 2d 997 (5th Cir. 1988). In the present case, no clause of 28 U.S.C. 1447(c) is cited, or even referenced by implication, in the respondent Boutte's Motion to Remand or the Court's Written Reasons. The United States Supreme Court has held that such an Order is not immune from review. *Thermtron Products, Inc. v. Hermansdorfer*, 96 S. Ct. 584, 423 U.S. 336, 46 L.Ed. 2d. 542 (1976), and that a Writ of Mandamus such as this one is the proper procedural vehicle to pursue that review.

In that case, apparently on its own Motion, a Federal District Judge remanded a properly removed diversity case when his docket was too crowded. The Court of Appeal denied the Petition for Writ of Mandamus. However, the Supreme Court entertained the petition on the ground that an otherwise properly removed action may

no more be remanded because a district court considers itself too busy to try it than an action properly filed in Federal Court in the first instance may be dismissed or referred to state courts for that reason. The Supreme Court, per Justice White, held that a district court, which remands a case to state court on any ground other than that the case was removed "improvidently and without jurisdiction," exceeds its statutorily-defined power. *Thermtron Products, Inc.*, 96 S. Ct. at 593. *See also In re Wilson Industries, Inc.*, 886 F.2d 93 (5th Cir. 1989); *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124 (5th Cir. 1982) (per curim [sic]); *In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642 (5th Cir. 1978); *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11 Cir. 1992); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990).

In the case at bar, like in *Thermtron*, and *In re Surinam Airways Holding Co.*, the District Court remanded the action based upon non-statutorily-endorsed grounds. It is undisputed that at the time this Court signed the remand Order, SELLICK had been served, and its presence in the case did not destroy the subject matter jurisdiction conferred upon the Court by 28 U.S.C. 1332 and designated as such in the removal petition. The parties implicitly, if not explicitly, recognized SELLICK'S position in the removed case by reinstating the original action against SELLICK after it had been dismissed under the local rules for non-prosecution, and then by specifically reserving rights against SELLICK in the Federal Court pleading which dismissed Morton and Derise.

If the failure of Morton to join SELLICK in its original removal of the case was a defective use of 28 U.S.C. 1441, that defect was waived when Respondent Boutte waited

more than thirty days to move to remand. 28 U.S.C. 1447(c) provides, in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days of the filing of the Notice of Removal, under section 1446(a). If at any time before final Judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded.

The Motion to Remand could not fit under any statutory "cubbyhole" of 1447(c), and the Respondent District Judge is vested with no more authority to remand a case when the parties consent to its remand than it is to remand a case when its docket is so crowded that it feels it must do so in the interest of justice. *Thermtron Products, Inc.*, 96 S. Ct. at 590; *Romero v. ITEN Imperial Corp.*, 332 F. Supp. 523 (P.R. 1971); *Isbrand T Sen Co. v. District 2, Marine Engineers Ben. Assoc.*, 256 F. Supp. 68, 77 (E.D.N.Y. 1966).

In the case *sub judice*, even if both parties consented to a remand, as Judge Haik found in his written reasons, the district court must refuse that Motion if the case is otherwise properly before the Court. To do otherwise would destroy traditional concepts of federal-state comity, and cast in doubt the validity of other efforts of district courts – such as the Anti-Injunction Act Cases, 28 USC 2283 – to guard against encroachments upon the jurisdiction given them by the constitution and the Congress.

WAIVER – PROCEDURAL POSTURE OF THIS MOTION

Respondents may oppose this Motion on the basis that SELLICK has waived its right to complain, since it took no further action to remove the suit after the "remand" at issue, or to appeal the remand order. But as pointed out by Professor Wright: "Courts are slow to find such a waiver, even when the complaining defendant had taken action in state court and then sought removal of the action." Wright, *Law of the Federal Courts*, Student Ed. Section 38, pg. 218 (1984).

In any case, SELLICK could not participate in an act which attempted to cloak this Court with an authority not conferred upon it by statute. Likewise, neither in Respondent Judge Haik's opinion, nor by Respondent Boutte, has there been any claim of prejudice brought about as a result of such delay.

As to the additional question, that is, whether a closed case can be reopened, we contend this Court's general equitable powers, particularly those in aid of its own jurisdiction, 28 USC 1651, may be invoked to overturn an erroneously-entered, invalid Order.

In that event, this case is different from *Three J Farms, Inc. v. Alton Box Car Company*, 609 F. 2d. 112 (4th Cir. 1979). There, the District Court remanded a case without giving the removing defendants an opportunity to argue their position. The Court stated this was done "by mistake and inadvertence." While giving lip service to the principle of review as enunciated by *Thermtron*, the remand accomplished by the Judge in *Three J* was done pursuant to Section 1447(c), or at least purported to be.

But the Circuit Court distinctly reserved for a later case the question of "whether a district court has the authority to vacate a remand order which was entered by 'mistake and inadvertence' in the true sense of that phrase . . . " No other case has raised this question, and none has resolved it.

CONCLUSION AND RELIEF SOUGHT

We urge this Court to recognize what occurred in this case for what it is: a mistake. As no statutory authority was cited, the Respondent District Judge was without authority to remand this case to the 16th Judicial District Court of the Parish of Iberia. If the parties truly wanted to consent to litigate their case in State Court, that result could have validly been accomplished by dismissing the federal suit without prejudice. As Sellick had at that stage extended no appearance in the federal court suit, its consent to such a motion was not required. Rule 41(a)(1), FRCP.

If a District Judge cannot allow collusion to create jurisdiction – and he clearly cannot – he should not allow the parties to destroy it in that fashion.

It would set a dangerous precedent for this Court to endorse an action by the Respondent District Judge which is not sanctioned by statute. No Federal Circuit has taken such a step, and the result, if not the specific procedure, has been assailed and disallowed by the U.S. Supreme Court.

Therefore, petitioner prays this Honorable Court issue a Writ of Mandamus directed to the Honorable

Judge Richard T. Haik, Judge of the Western District Court of the State of Louisiana directing him to send this Court a certified copy of the proceedings entitled "Joseph M. Boutte v. Morton International, Inc., et al" docket No.; CV-91-1556-L-O on the docket of the said court and lately pending therein to the end that the validity of the questioned order may be ascertained, and enjoining the said respondents from proceeding further in the cause until judgment shall be pronounced by further order of this Court.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon:

(1) Richard Ducote, 335 Decatur Street, New Orleans, Louisiana 70130, (504) 581-5152, Attorney for Joseph M. Boutte, Respondent/Appellant.

(2) Darrell Cherry; Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana 70130, (504) 581-5141, Attorneys for Morton International, Inc. and James Derise, Defendant.

(3) Honorable Richard T. Haik, United States Western District Judge, Lafayette – Opelousas Division, 213 Federal Building, 705 Jefferson Street, Lafayette, Louisiana, 70501, (318) 262-6875.

by depositing a copy of same to in the United States Mail, properly addressed and postage prepaid on this 10th day of November, 1993.

/s/ James B. Doyle
JAMES B. DOYLE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5487

IN RE:

SELLICK EQUIPMENT, INC.,

Petitioner.

Petition for Writ of Mandamus and/or Prohibition
to the United States District Court for the
Western District of Louisiana

(Filed Nov. 16, 1993)

Before GARWOOD, SMITH AND DeMOSS, Circuit Judges

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

MOT-6F
Rev. 3/91